

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

10	SIMPLICITY INTERNATIONAL,	)	CV 09-6146 SVW (RCx)
11		)	
12	Plaintiff,	)	
13	v.	)	ORDER DENYING DEFENDANT
14	GENLABS CORPORATION, and KRANSON	)	TRICORBRAUN'S MOTION TO COMPEL
15	INDUSTRIES, INC., d/b/a	)	ARBITRATION BUT GRANTING
16	TRICORBRAUN,	)	TRICORBRAUN'S MOTION FOR A STAY
17		)	OF THIS ACTION PENDING
18	Defendants.	)	ARBITRATION [53]; DENYING AS
19		)	MOOT TRICORBRAUN'S MOTION FOR A
20		)	TRIAL CONTINUANCE [54]; AND
21		)	DENYING TRICORBRAUN'S MOTION
22		)	FOR SANCTIONS [55]

**I. INTRODUCTION**

This is a breach of contract and breach of warranty case brought in this Court under diversity jurisdiction. Plaintiff Simplicity International ("Plaintiff" or "Simplicity") is a research and development company that has developed a line of liquid cleaning products. In 2008 and 2009, Plaintiff had a sale agreement with Walmart to sell certain of Plaintiff's liquid cleaning products to retail consumers at Walmart stores ("the Walmart Project"). Plaintiff entered into separate contracts with each of the named Defendants in

1 this action, Genlabs Corp. ("Genlabs") and Kranson Industries, Inc.  
2 d/b/a Tricorbraun ("Tricorbraun") to assist in the production and  
3 shipment of Simplicity's liquid cleaning products for the Walmart  
4 Project. Genlabs was hired to mix the formulas for Plaintiff's  
5 cleaning products and package the products in bottles for delivery to  
6 Walmart stores. Tricorbraun was hired to make the bottles and labels  
7 that were used by Genlabs to package the products.

8 Ultimately, when the products arrived at Walmart stores, a  
9 substantial amount of the bottles had defective labeling and were unfit  
10 for retail sale. As a result, Plaintiff alleges that it lost the  
11 relationship with Walmart. The primary issues in this case are whether  
12 fault lies with Genlabs or Tricorbraun (or both or neither) for the  
13 defective labeling,<sup>1</sup> and the scope of Plaintiff's alleged damages.

14 On April 5, 2010, Defendant Tricorbraun filed three motions, each  
15 of which came before the Court for a hearing on May 3, 2010. First,  
16 Tricorbraun moved for an order compelling the dispute between Plaintiff  
17 and Tricorbraun to arbitration pursuant to an arbitration agreement  
18 entered into between the parties, and for a motion to stay this action  
19 pending a resolution of the arbitration. Plaintiff opposed the motion  
20 to compel. Defendant Genlabs did not oppose the motion to compel, on  
21 the condition that any order compelling arbitration between Plaintiff  
22 and Tricorbraun would not delay the suit between Plaintiff and Genlabs.

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<sup>1</sup>Plaintiff initially sued only Defendant Genlabs in this action. Defendant  
26 Genlabs thereafter brought a third-party complaint against Tricorbraun for  
27 implied indemnity. However, on February 16, 2010 Genlabs stipulated to  
28 dismiss its third-party complaint against Tricorbraun without prejudice. The  
next day, Plaintiff sought leave to amend its Complaint to add Tricorbraun as  
a direct Defendant, which the Court granted. Plaintiff filed its First  
Amended Complaint naming both Genlabs and Tricorbraun on March 22, 2010.

1 In the alternative, Tricorbraun brought a motion for a six-month  
2 trial continuance in the event that its motion to compel arbitration is  
3 denied. Finally, Tricorbraun filed a motion for sanctions against  
4 Plaintiff's counsel, Alfred Dovbish, for having an ex parte  
5 communication with an employee of Tricorbraun.

6 For the reasons stated below, the Court finds that a valid  
7 arbitration agreement exists between Plaintiff and Tricorbraun and that  
8 the dispute at issue is arbitrable under that agreement. However, this  
9 Court sitting in the Central District of California cannot compel  
10 arbitration in the forum agreed to by the parties, St. Louis, Missouri.  
11 Thus, the Court DENIES Tricorbraun's motion to compel arbitration, but  
12 GRANTS Tricorbraun's motion to stay this action.<sup>2</sup> The action against  
13 Tricorbraun is stayed pending arbitration of the dispute in accordance  
14 with the contract between Plaintiff and Tricorbraun. Tricorbraun is  
15 advised that a motion to compel arbitration must be filed in the  
16 district where the arbitration is to be held.

17 Tricorbraun's motion for a trial continuance is therefore DENIED  
18 as MOOT.

19 Tricorbraun's Motion for Sanctions is DENIED.

## 20 **II. MOTION TO COMPEL ARBITRATION AND FOR A STAY**

### 21 **A. Background**

22 As stated above, Simplicity is a research and development company  
23 headquartered in Longmont, Colorado that created a liquid laundry  
24 detergent and fabric softener which it sold to Walmart stores from

25 <sup>2</sup> At the May 3, 2010 hearing, the Court granted the motion to compel, and indicated  
26 that the Court was ordering the matter to arbitration. That ruling was in error.  
27 Neither party had raised the issue (either in briefing or at the hearing) of  
28 whether this Court could order arbitration in a district outside of the Central  
District of California. Upon review of the relevant authority, however, the Court  
concludes that it cannot do so. For this reason, the Court grants Tricorbraun's  
motion for a stay of this action pending arbitration.

1 January 2008 to August 2009 ("the Walmart Project"). Tricorbraun is a  
2 company specializing in the design and supply of rigid packaging  
3 solutions. Tricorbraun is headquartered in St. Louis, Missouri.

4 In or about October 2007, the owner of Simplicity, Jeff Wycoff,  
5 contacted Tricorbraun and asked Tricorbraun to assist Plaintiff in  
6 designing and supplying the bottles needed for its line of liquid  
7 detergent and fabric softener to be used for the Wal-Mart Project.  
8 Tricorbraun agreed to do so. To consummate the relationship, Wycoff  
9 (on behalf of Plaintiff) signed an agreement titled "Credit Application  
10 and Terms and Conditions of Sale," on November 14, 2007 ("the  
11 Agreement"). (Dunwiddie Decl., Exh. A.) The Agreement consists of two  
12 pages: the first page is a form in which Wycoff provided very general  
13 information about Simplicity including its business address, the names  
14 and contact information of the owners, the state of incorporation, and  
15 the tax identification number. The second page is titled "Terms and  
16 Conditions of Sale." The very first lines of the Terms and Conditions  
17 of Sale read:

18 EXCLUSIVE GOVERNING PROVISIONS: The sale of all goods and  
19 services by the seller (the "Company") to the purchaser shall  
20 be subject to and governed exclusively by these terms and  
21 conditions of sale (the "Conditions"). The Company's  
22 acceptance of any order or other offer by the purchaser . . .  
23 for any goods or services shall be conditioned on the  
24 purchaser's assent to these Conditions. Such assent shall be  
25 deemed given five days after the earlier to occur of (i) the  
26 Company's deposit of these conditions in the U.S. Mail,  
27 postage prepaid, addressed to the purchaser, or (ii) the  
28 purchaser's receipt of these Conditions; unless, prior to the  
expiration of such period [the purchaser objects in writing  
to the Conditions].

25 Id. The document then goes on to state conditions relevant to payment  
26 terms, taxes, delivery terms, risk of loss, disclaimers of warranties,  
27 product testing, jurisdictional provisions, and the like.

1 Relevant to the current motion to compel, the Terms and Conditions  
2 of Sale includes the following arbitration clause:

3 13. ARBITRATION: ANY DISPUTE, CONTROVERSY, OR CLAIM ARISING  
4 FROM THE SALE OF GOODS OR SERVICES BY COMPANY TO PURCHASER  
5 SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION  
6 ADMINISTERED BY THE AMERICAN ARBITRATION PROVISION ("AAA")  
7 UNDER ITS COMMERCIAL ARBITRATION RULES. ALL SUCH ARBITRATION  
8 PROCEEDINGS SHALL TAKE PLACE IN ST. LOUIS, MISSOURI.

9 Id. The Agreement also includes the following choice-of-law provision:

10 17. APPLICABLE LAW. The terms of these Conditions shall be  
11 interpreted and the rights and obligations of the parties  
12 hereto shall be governed and determined by the Uniform  
13 Commercial Code and the other internal laws of the State of  
14 Missouri. Whenever the term "Uniform Commercial Code" is  
15 used herein, it shall be construed as meaning the Uniform  
16 Commercial Code as adopted by the State of Missouri as  
17 effective and in force on the date of this sale. . . .

18 Id. Finally, the Agreement includes the following language in all  
19 capital letters just above the signature line where Wycoff signed:

20 THE UNDERSIGNED APPLICANT AGREES THAT THE SALE OF ALL GOODS  
21 AND SERVICES BY THE SELLER, INCLUDING THOSE FOR WHICH CREDIT  
22 IS EXTENDED PURSUANT TO THIS CREDIT APPLICATION AND TERMS AND  
23 CONDITIONS OF SALE, SHALL BE SUBJECT TO THE TERMS AND  
24 CONDITIONS OF SALE AS SET FORTH ABOVE . . .

25 Id.

26 Wycoff does not dispute that on November 14, 2007, he signed the  
27 Agreement at the bottom of the page containing the Terms and Conditions  
28 of Sale. Further, it is undisputed that after this Agreement was  
signed, Tricorbraun provided goods and services to Simplicity and  
Simplicity paid for such goods and services.

Tricorbraun argues that the Agreement and the arbitration clause  
therein is valid, irrevocable and enforceable; thus, the Court must  
compel this action to arbitration. In response, Plaintiff contends  
that the Agreement did not constitute a valid contract. Plaintiff  
argues that the Agreement was simply an application for credit, which  
was contingent upon Tricorbraun extending credit to Plaintiff.



1 Plaintiff asserts that Tricorbraun denied the credit application;<sup>3</sup> thus,  
2 the "purported contract" never existed or was never validly formed.

3 **B. Legal Standard**

4 The parties dispute the legal standard that governs Tricorbraun's  
5 motion to compel arbitration. Tricorbraun argues that the Federal  
6 Arbitration Act ("FAA") governs the issue of arbitrability, whereas  
7 Plaintiff asserts that California law should control. The primary  
8 difference between the two is that under California law, even if a  
9 binding and valid arbitration agreement exists, the California Code of  
10 Civil Procedure § 1281.2 provides the Court with discretion not to  
11 enforce the arbitration agreement where one party to the agreement is  
12 "also a party to a pending court action . . . with a third party  
13 arising out of the same transaction or series of related transactions  
14 and there is a possibility of conflicting rulings . . ." Cal. Code  
15 Civ. Proc. 1281.2.<sup>4</sup> Under the FAA, in contrast, the Court must compel  
16 arbitration "upon being satisfied that the making of the agreement for  
17 arbitration and the failure [of one party] to comply therewith is not  
18 in issue." 9 U.S.C. § 4; Chiron Corp. v. Ortho Diagnostic Sys. Inc.,  
19 207 F.3d 1126, 1130 (9th Cir. 2000) (By its terms, the FAA "leaves no  
20 place for the exercise of discretion by a district court, but instead  
21 mandates that district courts *shall* direct the parties to proceed to  
22 arbitration on issues as to which an arbitration agreement has been  
23 signed.") (emphasis in original). (quoting Dean Witter Reynolds, Inc.

24 <sup>3</sup> Tricorbraun disputes this fact. Tricorbraun contends that it never denied  
25 Plaintiff's credit application and that, in fact, Tricorbraun provided certain  
26 goods to Plaintiff on credit. As explained below, however, this factual dispute is  
27 not material.

28 <sup>4</sup> In such circumstances, the Court may order "intervention or joinder of all parties  
in a single action or proceeding." Cal. Code Civ. Proc. 1281.2. Here, Plaintiff  
has asserted identical claims arising out of the same transaction or series of  
transactions against Defendant Genlabs, which is not subject to any arbitration  
agreement.

1 v. Byrd, 470 U.S. 213, 218 (1985)).

2 Contrary to Plaintiff's argument otherwise, the FAA clearly  
3 governs the arbitrability of the present dispute. The FAA applies to  
4 any "contract evidencing a transaction involving commerce." 9 U.S.C. §  
5 2. "Commerce" is defined as "commerce among the several states or with  
6 foreign nations," and is interpreted broadly. 9 U.S.C. § 1; Lucas v.  
7 Gund, Inc., 450 F. Supp. 2d 1125, 1129 (C.D. Cal. 2006); Circuit City  
8 Stores, Inc. v. Adams, 532 U.S. 105, 112 (2001) ("involving commerce"  
9 interpreted as "implementing Congress's intent 'to exercise its  
10 commerce power to the full.'"") Where the agreement involves commerce,  
11 "the FAA creates a 'body of federal substantive law of arbitrability'  
12 enforceable in both state and federal courts and preempting any state  
13 laws or policies to the contrary." In re Jamster Marketing Litig., MDL  
14 No. 1751, No. 05cv0819 JM (CAB), 2008 WL 4858506, at \*2 (S.D. Cal.,  
15 Nov. 10, 2008) (quoting Moses H. Cone Memorial Hosp. v. Mercury Const.  
16 Corp., 460 U.S. 1, 24 (1983)); Cohen v. Wedbush, Noble, Cooke, Inc.,  
17 841 F.2d 282, 285 (9th Cir. 1988).

18 Here, the parties do not dispute that their contract involved  
19 commerce. Indeed, the goods provided for under the agreement between  
20 Plaintiff and Tricorbraun were shipped across state lines several  
21 times: the molds used to create the bottles were manufactured in  
22 California and then shipped across state lines to Atlanta, Georgia; the  
23 bottles were manufactured from such molds in Atlanta and then shipped  
24 across state lines to Genlabs' facility in Mississippi for filling and  
25 labeling; and finally, once the bottles were filled with the product  
26 and labeled, they were shipped to Walmart stores across the country.

1 Thus, the FAA clearly applies to this contract.<sup>5</sup>

2 Under the FAA, if a valid arbitration agreement exists, it must be  
3 enforced by the federal courts. 9 U.S.C. § 1, et. seq.. Thus, the  
4 court's role under the FAA is limited to determining: (1) whether a  
5 valid arbitration agreement exists, and if it does, (2) whether the  
6 agreement encompasses the dispute at issue. Chiron Corp. v. Ortho  
7 Diagnostic Systems, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). If  
8 these inquiries are met, the district court shall stay further  
9 proceedings and order arbitration. 9 U.S.C. §§ 3, 4. Finally, the FAA  
10 evidences a broad policy in favor of arbitration; "as a matter of  
11 federal law, any doubts concerning the scope of arbitrable issues

12 <sup>5</sup> Notably, parties may contract around the provisions of the FAA through a valid  
13 choice-of-law provision, but only where such choice-of-law provision expressly  
14 incorporates the procedural rules of a specific jurisdiction. Stone & Webster,  
15 Inc. v. Baker Process, Inc., 210 F. Supp. 1177 (S.D. Cal. 2002). Absent such a  
16 specific provision, the Supreme Court has held that the federal rules under the FAA  
17 govern whether an arbitration will be ordered, and the allocation of authority  
between the courts and arbitrators. Mastrobuono v. Shearson Lehman Hutton, Inc.,  
514 U.S. 52, 62 (1995); see Chiron Corp., 207 F.3d at 1130 (a general choice-of-law  
clause does not incorporate state rules that govern the allocation of power between  
courts and arbitrators); Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1212-13  
(9th Cir. 1998) (same). As the court explained in Stone & Webster, Inc.:

18 [I]n order to contract around the FAA, parties must expressly do so in  
19 their agreement. . . . [I]f parties intend state laws to govern the  
20 issue of arbitrability (where the issue would otherwise be governed by  
21 the FAA), they must make specific reference to the state law they  
intend to incorporate in their contract. . . . A general choice-of-law  
clause will not suffice. A general choice-of-law clause will only be  
construed as incorporating state substantive laws, NOT state procedural  
laws.

22 210 F. Supp. 2d at 1182 (emphasis in original) (internal citations omitted).

23 Here, the parties did not contract around the FAA. Certainly, there is no  
24 evidence that the parties contracted for California law to apply to their  
25 relationship. Thus, Plaintiff's argument regarding the California Code of Civil  
26 Procedure is wholly unfounded. Further, while the parties' Agreement did include a  
27 choice-of-law provision indicating that Missouri law would apply to their  
28 substantive rights and obligations, the provision was a general choice-of-law  
clause and did not specifically incorporate Missouri procedural rules related to  
arbitration. Cf., Fiordelisi v. Mt. Pleasant LLC, 254 S.W.3d 120 (E.D. Mo. 2008)  
(agreement explicitly incorporated Missouri procedural rules where the arbitration  
clause stated: "The parties shall proceed with arbitration in accordance with the  
rules and procedures of the American Arbitration Association and the provisions of  
the Missouri Uniform Arbitration Act.") (emphasis added). Thus, the FAA applies to  
the Agreement between the parties.



1 should be resolved in favor of arbitration. . . ." Mastrobuono v.  
2 Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 n.8 (1995) (quoting Moses  
3 H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25  
4 (1983)).

5 **C. Existence and Validity of the Agreement**

6 **1. Allocation of Authority Between the Court and the**  
7 **Arbitrator**

8 Under the FAA, a party may challenge the validity or  
9 enforceability of an arbitration agreement "upon such grounds that  
10 exist at law or in equity for the revocation of any contract." 9  
11 U.S.C. § 2. Challenges to the validity of an arbitration agreement can  
12 take several forms and the nature of the challenge governs whether the  
13 Court or the arbitrator must resolve the issue. See Buckeye Cashing  
14 Inc. v. Cardegna, 546 U.S. 440, 444 (2006). Where a party specifically  
15 challenges the validity of *the agreement to arbitrate* - for example, on  
16 the ground that the arbitration clause is unconscionable - the district  
17 court, and not the arbitrator, must resolve the issue. Id. at 445.  
18 Conversely, where a party challenges the validity of the contract as a  
19 whole - i.e., the underlying contract that contains the arbitration  
20 provision - the allocation of authority between the court and the  
21 arbitrator turns on whether the party is challenging the very **existence**  
22 of the contract or its **enforceability**.

23 Challenges to the existence or formation of the underlying  
24 contract are resolved by the district court. Sanford v. Memberworks,  
25 Inc., 483 F.3d 956, 962 (9th Cir. 2007). For example, in Sanford,  
26 the plaintiff ordered a set of fitness tapes in response to a  
27 television advertisement, and upon doing so, was automatically enrolled  
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1 in program entitling her to discounts on certain retail products in  
2 exchange for a monthly fee. Id. 958-59. Defendant sent plaintiff a  
3 "membership kit" regarding the discount program, including a contract  
4 that contained an arbitration clause. Id. at 959. Plaintiff disputed  
5 ever receiving the membership kit or assenting to the membership  
6 contract. Id. The court held that the existence of the membership  
7 contract was a matter for the court to decide, not the arbitrator:

8       It is axiomatic that arbitration is a matter of contract and  
9       a party cannot be required to submit any dispute which he has  
10      not agreed so to submit. As a result, when one party  
11      disputes the making of the arbitration agreement, the Federal  
12      Arbitration Act requires that "the court [] proceed summarily  
13      to the trial thereof" before compelling arbitration under the  
14      agreement. 9 U.S.C. § 4. We have interpreted this language  
15      to encompass not only challenges to the arbitration clause  
16      itself, but also challenges to the making of the contract  
17      containing the arbitration clause. . . . [C]hallenges to the  
18      existence of a contract as a whole must be determined by the  
19      court prior to ordering arbitration.

20 Id. at 962 (emphasis in original).

21       Conversely, challenges to the enforceability of the contract as a  
22      whole - for example, where the contract is illegal or unconscionable -  
23      are considered by the arbitrator. Buckeye Check Cashing, Inc., 546  
24      U.S. at 446. As the Supreme Court in Buckeye explained, "as a matter  
25      of substantive federal arbitration law, an arbitration provision is  
26      severable from the remainder of the contract . . .; [thus,] unless the  
27      challenge is to the arbitration clause itself, the issue of the  
28      contract's validity is considered by the arbitrator in the first  
29      instance." Id.

30       Here, it is clear that Plaintiff is not challenging the  
31      arbitration provision specifically. Rather, Plaintiff contends that  
32      the underlying contract that contains the arbitration agreement - the  
33      "Credit Agreement and Terms and Conditions of Sale" ("the Agreement") -

1 never constituted a valid contract. Specifically, Plaintiff argues  
2 that the Agreement was a credit application and that the terms and  
3 conditions therein were contingent upon Tricorbraun's acceptance of the  
4 application. Thus, Plaintiff contends that when Tricorbraun  
5 purportedly denied Plaintiff's credit application, the agreement was  
6 "void ab initio." (Opp'n at 4.) This is clearly a challenge to the  
7 existence of the underlying contract. Thus, the Court, not the  
8 arbitrator, must resolve whether the Agreement constituted a valid  
9 contract.<sup>6</sup>

## 10 2. Right to a Jury Trial?

11 The next issue the Court must address is whether it must submit  
12 the issue of contract formation to a jury. The FAA provides that,  
13 where the making of the arbitration agreement is in issue, "the court  
14 shall proceed summarily to the trial thereof." 9 U.S.C. § 4.  
15 Additionally, the statute provides that "where such an issue is raised,  
16 the party alleged to be in default [of the arbitration agreement] may  
17 . . . on or before the day of the return day of the notice of  
18 application, demand a jury trial of such issue, and upon such demand  
19 the court shall make an order referring the issue or issues to a jury  
20 . . . ." Id.

21 Courts have interpreted this language to require a jury trial  
22 "only where there is a triable issue concerning the existence or scope  
23 of the agreement." Hill v. Ins. Co. of West, No. 10cv76 BTM (BLM),

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24 <sup>6</sup> To the extent that the Plaintiff is arguing instead that a valid contract was  
25 formed, but Plaintiff's performance became excused by the denial of credit - i.e.,  
26 that the acceptance of credit was a basic assumption upon which the contract was  
27 made and the non-occurrence of that event excused Plaintiff's performance - the  
28 issue is one of *enforceability* of the contract, which would be decided by the  
arbitrator. See Buckeye Check Cashing, Inc., 546 U.S. at 446; Restatement (Second)  
Contracts § 261 (discharge of performance by impracticability). This does not  
appear to be Plaintiff's argument; however, even if it were, arbitration would be  
the proper forum to resolve that issue.

2010 WL 1709325, at \*3 (S.D. Cal., Apr. 26, 2010) (quoting Saturday Evening Post Co. v. Rumbleseat Press, 816 F.2d 1191, 1196 (7th Cir. 1987)).<sup>7</sup> A jury trial is not warranted if the arbitrability of the parties' dispute involves no questions of material fact. Saturday Evening Post Co., 816 F.3d at 1196 ("If the arbitrability of the parties' dispute involves no questions or only legal questions, a jury trial would be pointless because its outcome could not affect the judge's decision on whether to order arbitration."); see Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54-55 (3d Cir. 1980) (same). The party resisting arbitration bears the burden of showing that he is entitled to a jury trial under section 4. Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1154 (5th Cir. 1992); Doctor's Associates Inc. v. Distajo, 107 F.3d 126, 129-30 (2d Cir. 1997). Thus, "as when opposing a motion for summary judgment under Fed. R. Civ. P. 56, the party requesting a jury trial must 'submit evidentiary facts showing that there is a dispute of fact to be tried.'" Doctor's Assoc. Inc., 107 F.3d at 129-30 (quoting Oppenheimer & Co., Inc. v. Neidhardt, 56 F.3d 352, 358 (2d Cir. 1995)).

Here, Plaintiff clearly has not met its burden of establishing that a jury trial is required regarding the existence of the Agreement. First, Plaintiff has not demanded a jury trial with respect to the issue of whether an arbitration agreement exists.<sup>8</sup> Second, even if Plaintiff had made such a demand, as explained more fully below, there are no material disputes of fact as to the existence of the contract

<sup>7</sup> The Ninth Circuit recently adopted this same view in an unpublished opinion. Reily v. WM Financial Servs. Inc., 95 Fed. Appx. 851, 852 (9th Cir. 2004).

<sup>8</sup> Plaintiff generally demanded a jury trial in the caption of its First Amended Complaint; however, Plaintiff did not raise this issue in connection with Tricorbraun's motion to compel nor did it argue for a jury trial on the issue of whether a valid arbitration agreement exists between the parties.



1 that contained the arbitration agreement between Plaintiff and  
2 Tricorbraun. Thus, the Court may decide, based on the **undisputed**  
3 evidence submitted in connection with this motion, whether a valid  
4 contract exists between Plaintiff and Tricorbraun.

5 **3. Whether a Valid Contract Was Formed**

6 The Court now turns to the merits of Tricorbraun's motion. As  
7 stated above, the parties dispute whether the Agreement constituted a  
8 valid contract. Plaintiff asserts that the Agreement was nothing more  
9 than a credit application - i.e., an application to purchase goods from  
10 Tricorbraun on credit. According to Plaintiff, Tricorbraun  
11 subsequently denied the application for credit, which required  
12 Plaintiff to obtain a Letter of Credit from a third party to purchase  
13 the goods. Plaintiff contends that the Agreement was contingent upon  
14 Tricorbraun's acceptance of credit, which never occurred. Thus, the  
15 Agreement never came into existence. In response, Tricorbraun first  
16 asserts that it never denied credit to Plaintiff. More importantly,  
17 however, Tricorbraun argues that the Agreement was not contingent upon  
18 any extension of credit to Simplicity.

19 Under the FAA, the court must apply general state contract law  
20 principles to determine whether an agreement to arbitrate was formed  
21 and is valid. Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170  
22 (9th Cir. 2003) ("To evaluate the validity of an arbitration agreement,  
23 federal courts 'should apply ordinary state-law principles that govern  
24 the formation of contracts.'") (quoting First Options of Chicago, Inc.  
25 v. Kaplan, 514 U.S. 938, 944 (1995)). The first inquiry is which  
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1 state's law shall apply to the contract dispute.<sup>9</sup> "A federal court  
2 sitting in diversity must apply the choice-of-law rules of the state in  
3 which it sits." IMA North America, Inc. v. Marlyn Nutraceuticals,  
4 Inc., No. CV-06-0344-PHX-LOA, 2008 WL 312090, at \*4 (D. Ariz. Feb. 1,  
5 2008) (citing Fields v. Legacy Heath Sys., 413 F.3d 943, 950 (9th Cir.  
6 2005)). Thus, this Court applies California choice-of-law rules to  
7 determine which jurisdiction's law applies.

8 In contract cases, California courts follow the principles of the  
9 Restatement Second of Conflict of Laws ("the Restatement") and the  
10 California Commercial Code regarding choice-of-law issues. Shannon-  
11 Vail Five, Inc. v. Bunch, 270 F.3d 1207, 1210-11 (9th Cir. 2001);  
12 WITKIN, 1 SUMMARY OF CALIFORNIA LAW, CONTRACTS §§ 66-67, (10th ed. 2005).  
13 Section 187 of the Restatement generally provides that if the parties  
14 have chosen a particular state's law to govern their dealings, the  
15 court will honor that choice.<sup>10</sup> Rest. (Second) Conflicts of Laws § 187;  
16 Shannon-Vail Five, Inc., 270 F.3d at 1211; Ribbens Int'l, S.A. de C.V.  
17 v. Transport Int'l Pool, Inc., 47 F. Supp. 2d 1117, 1120-21 (C.D. Cal.  
18 1999); WITKIN, 1 SUMMARY OF CALIFORNIA LAW, CONTRACTS § 66. Here, the parties  
19 have agreed that the "rights and obligations of the parties" with  
20 regard to the sale of goods from Tricorbraun to Simplicity shall be  
21

22 <sup>9</sup> The Court notes that neither party addressed the choice-of-law issue in their  
23 briefs. Additionally, when addressing the issue of whether a valid contract was  
24 formed, **neither party cited any applicable authority from any jurisdiction** in  
25 support of their arguments. Thus, the parties have not argued that any particular  
26 jurisdiction's laws should apply to this case.

27 <sup>10</sup> There are exceptions to this rule where the chosen state has no substantial  
28 relationship to the parties or the transaction or application of the law of the  
chosen state would be contrary to a fundamental policy of a state which has a  
materially greater interest in the determination of the issue. Rest. (Second)  
Conflict of Laws § 187(2). However, the Court has no reason to believe either of  
these exceptions apply. Here, the chosen state - Missouri - clearly has a  
relationship to the parties and the transaction because Tricorbraun is  
headquartered in St. Louis, Missouri. Further, the parties have not identified any  
other state that would have a materially greater interest in the resolution of this  
dispute.

1 governed by the "internal law of the State of Missouri," and the  
2 Uniform Commercial Code as adopted by the State of Missouri.  
3 (Dunwiddie Decl., Exh. A). Thus, the Court will apply Missouri law to  
4 determine whether a valid contract was formed.<sup>11</sup>

5 A valid contract for the sale of goods must include three basic  
6 elements: an offer, acceptance, and consideration. Walker v. Rogers,  
7 182 S.W.3d 761, 767 (W.D. Mo. 2006) (citing Luebbert v. Simmons, 98  
8 S.W. 3d 72, 77 (Mo. App. W.D. 2003)). In deciding whether these  
9 elements are met, the court must look to the Missouri Uniform  
10 Commercial Code, as well various principles of the common law of  
11 contracts that have not been displaced by the Code. Mo. Ann. Stat. §  
12 400.1-103.

13 Under the Missouri Uniform Commercial Code, "a contract for the  
14 sale of goods may be made in any manner sufficient to show agreement,  
15 including conduct by both parties which recognizes the existence of  
16 such a contract." Mo. Ann. Stat. § 400.2-204(1). The Code focuses  
17 primarily upon "mutuality of assent as [objectively] manifested by the  
18 conduct of the parties." Computer Network, Ltd. v. Purcell Tire &  
19 Rubber Company, 747 S.W. 2d 669, 673-74 (E.D. Mo. 1988). "The intent  
20 with which we are concerned is the *objective* manifestation of intent by  
21 the parties, that is, what a reasonably prudent person would be led to  
22 believe from the actions and words of the parties." Id. at 675  
23 (quoting Immel, 1 Missouri Bar CLE, Civil Actions, § 7.1 (1980) and

24  
25 <sup>11</sup> Missouri law regarding the formation of contracts is not materially different from  
26 California law. Both States have adopted the provisions of the Uniform Commercial  
27 Code relating to the formation of contracts for the sale of goods. See Mo. Ann.  
28 Stat. § 400.2-204; Cal. Comm. Code § 2204. As to the rules of contract formation  
more generally, the laws do not vary significantly from jurisdiction to  
jurisdiction; both Missouri and California follow the approach stated in the  
Restatement Second of Contracts. See Rest. (Second) Contracts §§ 18-70; Walker v.  
Rogers, 182 S.W. 3d 761, 767-69 (W.D. Mo. 2006); Fosson v. Palace (Waterland) Ltd.,  
78 F.3d 1448, 1453 (9th Cir. 1996).

1 citing Embry v. Hargadine, McKittrick Dry Goods Co., 127 Mo. App. 383  
2 (1907)). If the expressions in the agreement are clear, the court can  
3 determine the intent of the parties from the writing alone; if not,  
4 surrounding circumstances such as the subsequent actions of the parties  
5 and the practical construction of the contract may be considered. Id.  
6 at 674.

7 Here, the Court concludes that both the expressions of the  
8 Agreement itself and the parties' conduct objectively manifest the  
9 intent to enter into a valid contract. First, Tricorbraun's conduct  
10 evidences a valid offer. An offer is "the manifestation of a  
11 willingness to enter into a bargain, so made as to justify another  
12 person in understanding that his assent to that bargain is invited and  
13 will conclude it." Walker, 182 S.W. 3d at 767 (citing Rest. (Second)  
14 Contracts, § 24 (1981)); Nordyne, Inc. v. Int'l Controls & Measurements  
15 Corp., 262 F.3d 843, (8th Cir. 2001) (noting that the UCC in Missouri  
16 does not define "offer;" thus, Missouri looks to its common law and the  
17 Restatement of Contracts for the definition). Here, Tricorbraun and  
18 Simplicity discussed and agreed in October 2007 that Tricorbraun would  
19 assist Simplicity with the design and supply of bottles and labels for  
20 its liquid cleaning products. (Dunwiddle Decl. ¶ 3.) Thereafter,  
21 Tricorbraun sent Simplicity the "Credit Application and Terms and  
22 Conditions of Sale" ("the Agreement") which outlined the terms and  
23 conditions upon which it would be willing to sell goods to Simplicity,  
24 including but not limited to, payment terms, delivery terms, assignment  
25 rights, risk of loss, testing, and warranties. The Agreement made it  
26 clear that Simplicity would be required to assent to such terms before  
27 Tricorbraun would provide goods to Simplicity. (Dunwiddle Decl., Exh.  
28



1 A, ¶ 1.) Tricorbraun made a valid offer to contract upon those terms.

2 Furthermore, Simplicity clearly assented to the Agreement,  
3 including all the applicable Terms and Conditions. The UCC in Missouri  
4 is very liberal with respect to how an offer may be accepted. 1  
5 Missouri Practice Series, Method of Practice: Transaction Guide § 19.6  
6 (4th ed. 2009). Specifically, an offer may be accepted by any manner  
7 "reasonable under the circumstances" unless the language of the offer  
8 deems how it is to be accepted. Mo. Ann. Stat. § 400.2-206(1)(a).  
9 Here, the Agreement specifically provides that Simplicity will be  
10 deemed to have assented to the Terms and Conditions upon receipt  
11 thereof, unless Simplicity rejects the Terms and Conditions in writing.  
12 (Dunwiddie Decl., Exh. A, ¶ 1.) Simplicity received the Agreement and  
13 never objected to the Terms and Conditions. (Wycoff Depo. at 256:8-  
14 14.) Moreover, the founder of Simplicity, Jeff Wycoff, admits that he  
15 signed the Agreement on November 14, 2007. (Id.) This is sufficient  
16 to constitute acceptance of the terms. Computer Network Ltd., 747 S.W.  
17 2d at 676 (where offeror sent a letter detailing the terms of the  
18 agreement and asked appellant to either sign the agreement or object to  
19 the terms, appellant's signature constituted a binding contract).  
20 Finally, although the Court need not consider extrinsic evidence given  
21 the clarity of the Agreement itself, Wycoff testified unequivocally  
22 that he understood his signature on the Agreement to be an assent to  
23 the Terms and Conditions contained therein, and that those terms were  
24 applicable to his business relationship with Tricorbraun. (Id. at  
25 256:20-257:7.) In light of this evidence, there can be no doubt that  
26 the parties intended the Agreement to be a valid and binding contract.<sup>12</sup>

27  
28 <sup>12</sup> That the Agreement is supported by consideration is obvious; Tricorbraun promised to provide goods to Simplicity in exchange for Simplicity's agreement to pay.

1       Nonetheless, Plaintiff argues that the Agreement is invalid  
2 because Tricorbraun purportedly denied credit to Simplicity, and such  
3 denial rendered the Agreement and its terms "void ab initio." Of  
4 course, this argument depends upon the assumption that the Agreement  
5 was contingent upon Tricorbraun's extension of credit to Simplicity.  
6 But there is no evidence to support this interpretation. The language  
7 of the Agreement itself does not, in any way, make the validity of the  
8 terms and conditions contingent upon an extension of credit. To the  
9 contrary, the Agreement expressly states that "the sale of all goods  
10 and services by the seller, including those for which credit is  
11 extended . . . shall be subject to the terms and conditions of sale as  
12 set forth above." (Dunwiddie Decl., Exh. A.) The only reasonable  
13 interpretation of this language is that the sale of any goods,  
14 regardless of whether they are provided on credit, is governed by the  
15 terms and conditions. Indeed, when the Court asked Plaintiff's counsel  
16 at the May 3, 2010 hearing to identify language in the Agreement  
17 supporting the idea of a credit contingency, he could not do so.<sup>13</sup>

18       Further, Plaintiff has produced no extrinsic evidence indicating  
19 that the parties intended the Agreement (and the terms therein) to be  
20 contingent upon Tricorbraun's extension of credit. What Plaintiff has  
21 produced is evidence that it obtained a Letter of Credit from a third  
22 party, which it used to purchase goods from Tricorbraun. But the mere  
23 fact that Tricorbraun did not sell such goods on credit does not  
24 indicate that the specific terms of the Agreement were contingent upon  
25

---

26       <sup>13</sup> Plaintiff's argument that the Agreement was simply an application for credit is  
27 also belied by the language of the Agreement itself. The Agreement includes  
28 several terms addressing the sale of goods that are wholly unrelated to the  
provision of credit - e.g., delivery terms, warranty terms, risk of loss, testing,  
etc. Further, it appears that Simplicity did not provide any financial information  
in connection with this Agreement. (Dunwiddie Decl., Exh. A, pg. 1.)

1 the provision of credit. Whether or not Tricorbraun extended credit to  
2 Plaintiff is an entirely separate matter - nothing in the Agreement  
3 either explicitly or implicitly indicates that the provision of credit  
4 affects the stated terms. This conclusion is consistent with  
5 Simplicity's understanding of the Agreement. Jeff Wycoff testified  
6 under oath in January 2010 that the terms of the Agreement governed his  
7 business relationship with Tricorbraun. This testimony occurred many  
8 months after Simplicity had obtained the Letter of Credit and purchased  
9 goods from Tricorbraun. Thus, Wycoff clearly did not believe that the  
10 terms and conditions were dependent upon an extension of credit by  
11 Tricorbraun.

12 In sum, the argument that the November 2007 Agreement was  
13 contingent upon an extension of credit is cut from whole cloth.  
14 Neither the language of the Agreement nor the parties' conduct supports  
15 that position; the Court flatly rejects it. For the reasons stated  
16 above, the Court concludes that the November 2007 Agreement, and the  
17 arbitration provision contained therein, are valid and binding on  
18 Plaintiff.

19 **D. Compelling Arbitration**

20 Having concluded that the arbitration provision in the Agreement  
21 is valid and enforceable, the question becomes where the arbitration is  
22 to be held. The Agreement between Plaintiff and Tricorbraun provides  
23 that any arbitration proceedings shall take place in St. Louis,  
24 Missouri. (Dunwiddie Decl., Exh. A, ¶ 13.) Additionally, at the May  
25 3, 2010 hearing, the parties appeared to agree that if arbitration is  
26 ordered, it should take place in St. Louis. Section 4 of the FAA  
27 provides, however:  
28

1 A party aggrieved by the alleged failure, neglect or refusal  
2 of another to arbitrate under a written agreement for  
3 arbitration may petition **any United States district court,**  
4 which, save for such agreement, would have jurisdiction under  
5 Title 28, in a civil action . . . of the subject matter of a  
6 suit arising out of a controversy between the parties, for an  
7 order directing that **such arbitration proceed in the manner  
provided for in such agreement.** . . . [T]he court shall make  
an order directing the parties to proceed to arbitration in  
accordance with the terms of the agreement. **The hearing and  
proceedings, under such agreement, shall be within the  
district in which the petition for an order directing such  
arbitration is filed.**

8 9 U.S.C. § 4 (emphasis added). Where, as here, the terms of the  
9 arbitration agreement provide for arbitration in a district outside the  
10 district in which the petition to compel is filed, "literal compliance  
11 with parts of Section 4 is impossible." Nagrampa v. Mailcoups, Inc.,  
12 No. C. 03-0208 MJJ, 2003 WL 25607105, at \*7 (N.D. Cal., Apr. 9, 2003).  
13 In other words, the Court cannot order arbitration in its own district  
14 and at the same time order arbitration in accordance with the terms of  
15 the agreement.

16 Under the plain language of section 4, the law is clear that this  
17 Court cannot order an arbitration to take place outside the Central  
18 District of California. Textile Unlimited, Inc. V. A. BMH and Company,  
19 Inc., 240 F.3d 781, 785 (9th Cir. 2001); Snyder v. Smith, 736 F.2d 409,  
20 419-20 (7th Cir. 1984), *overruled in part on other grounds by*, Felzen  
21 v. Andreas, 134 F.3d 873, 877 (7th Cir. 1998); *see* National City Golf  
22 Finance v. Higher Ground Country Club, 641 F. Supp. 2d 196, 202 n.2  
23 (S.D.N.Y. 2009). The circuit courts are split, however, as to whether  
24 the Court may ignore the forum selection clause in the parties'  
25 arbitration agreement (despite the statute's mandate that arbitration  
26 proceed in the manner provided for in the agreement) and order  
27 arbitration in its own district. "The majority view holds that where  
28



1 the parties agreed to arbitrate in a particular forum only a district  
2 court in that forum has the authority to compel arbitration under § 4.”  
3 Ansari v. Qwest Commc'ns Corp., 414 F.3d 1214, 1219-1220 (10th Cir.  
4 2005) (collecting cases from the Sixth, Seventh, and Third Circuits, as  
5 well as from the Southern District of New York and the Colorado  
6 District courts.) The Ninth Circuit, however, appears to take a  
7 different position.

8 In Textile Unlimited, Inc. v. A..BMH and Company, 240 F.3d 781  
9 (9th Cir. 2001), the Ninth Circuit affirmed the district court's  
10 conclusion that, despite a forum-selection clause indicating that  
11 arbitration should go forward in Georgia, venue was proper in the  
12 Central District of California. Id. at 784. In Textile, plaintiff  
13 bought goods from defendant over the course of thirty-eight  
14 transactions. In each transaction, plaintiff would send a purchase  
15 order and defendant would ship the goods along with an invoice and an  
16 order acknowledgement. Defendant's invoice form contained additional  
17 terms on the back of the invoice, including an arbitration provision  
18 calling for any disputes to be arbitrated in Atlanta, Georgia. Id. at  
19 783. A payment dispute arose, and defendant brought an arbitration  
20 action in Georgia. Id. at 784. Plaintiff contested the existence of a  
21 valid arbitration agreement and subsequently filed a preliminary  
22 injunction action in the Central District of California to enjoin the  
23 Georgia arbitration. Id. at 784, 785 n.1. The district court in  
24 California enjoined the Georgia arbitration, and the Ninth Circuit  
25 affirmed.

26 The Ninth Circuit held, “[u]nder the circumstances presented by  
27 this case, we conclude that the Federal Arbitration Act does not  
28

1 require venue in the contractually-designated arbitration locale." Id.  
2 at 783. The court noted that the venue provisions of the FAA "are  
3 discretionary, not mandatory." Id. at 785. In so holding, the court  
4 relied on the ruling in Cortez Byrd Chips, Inc. v. Bill Harbert  
5 Construction Co., 529 U.S. 193, 195 (2000), which held that venue  
6 provisions under §§ 9-11 of the FAA were permissive, not mandatory.  
7 The court concluded that the Cortez analysis should apply to the FAA as  
8 a whole. Id. Further, in analyzing the specific language of section  
9 4, the Ninth Circuit concluded: "\$ 4 only confines the *arbitration* to  
10 the district in which the petition to compel is filed. It does not  
11 require that the petition be filed where the contract specified that  
12 arbitration should occur." Id.

13 Although Textile Unlimited is binding on this Court, the ruling  
14 does not require the Court to order arbitration in the Central District  
15 of California. Rather, the language in Textile Unlimited is permissive  
16 - "the [FAA] does not *require* venue in the contractually-designated  
17 arbitration locale." Id. at 783. This language indicates that while  
18 the court *may* order arbitration in its own district, it need not do so.  
19 Nagrampa, 2003 WL 25607105, at \*7.

20 Further, the ruling in Textile Unlimited was limited to the facts  
21 of that case, see 240 F.3d at 983, which are readily distinguishable  
22 from the present case. Notably, in Textile Unlimited, the court  
23 reasoned: "\$ 4 . . . only embraces actions to compel arbitration.  
24 Thus, injunction actions, such as the one at bar, are properly  
25 considered under general venue provisions." Id. at 785. Thus, the  
26 court specifically cabined its ruling to injunction actions. Unlike  
27 Textile Unlimited, however, the present action is a motion to compel  
28

1 that falls squarely within § 4.

2 Additionally, in Textile Unlimited, the arbitration provision and  
3 the accompanying forum selection clause were tucked away in an invoice  
4 "so there was a strong dispute as to whether the [specific] arbitration  
5 agreement had ever been affected." See Nagrampa, 2003 WL 25607105, at  
6 \*7 (summarizing the facts of Textile Unlimited). The Ninth Circuit  
7 distinguished that circumstance from one where, as in Merrill Lynch,  
8 Peirce, Fenner & Smith, Inc. v. Lauer, 49 F.3d 323 (7th Cir. 1995), the  
9 parties do not contest the arbitration provision itself and the site  
10 for arbitration has been fixed. Textile Unlimited, 240 F.3d at 785  
11 n.1.

12 The present case fits the paradigm of Merrill Lynch, the case  
13 found inapposite in Textile Unlimited. Here, Plaintiff does not  
14 dispute the existence of the arbitration provision itself, and the  
15 location of the arbitration was designated as St. Louis, Missouri.  
16 Further, unlike the parties in Textile Unlimited, here, the parties  
17 appear to agree that Missouri is the proper venue if arbitration is  
18 ordered; neither party has argued for arbitration in the Central  
19 District of California. These facts warrant a different result than  
20 that in Textile Unlimited.<sup>14</sup>

21 <sup>14</sup> Snyder v. Smith, 736 F.2d 409 (7th Cir. 1984), aptly explains why the result  
22 should be different where the arbitration clause itself is not challenged and was  
freely negotiated:

23 An arbitration agreement, including its forum selection clause, is a  
freely-negotiated contract between the parties. Courts must give effect  
24 to such freely-negotiated forum selection clauses . . . . [I]f Snyder were  
to prevail here [in compelling arbitration in Illinois where the contract  
25 called for Texas], any party to an arbitration agreement could avoid the  
effect of the agreed-to forum merely by filing suit in a different  
26 district. This in turn could lead parties racing to different courthouses  
to obtain what each thinks is the most convenient forum for it, in  
disregard of its contractual obligations. This disregard is not what  
27 Congress intended when it enacted a statute to make arbitration agreements  
enforceable. Thus, the district court in this case had no power under the  
28 statute to order arbitration in its district in contravention of the  
parties' agreement.

1 The Court therefore declines to compel arbitration in the Central  
2 District of California. The Court concludes that the arbitration  
3 provision must be given effect, and that St. Louis is the only proper  
4 venue for the arbitration.

5 **E. Stay of These Proceedings**

6 In light of this ruling, the Court's options are limited. "Faced  
7 with the same situation, courts have either (1) dismissed the federal  
8 action, . . . (2) stayed the action, . . . or (3) transferred the  
9 action to the appropriate federal district court . . . ." M.C. Const.  
10 Corp. v. Gray Co., 17 F.Supp. 2d 541, 548 (W.D. Va. 1998) (collecting  
11 cases) (internal citations omitted). Given Tricorbraun's request for a  
12 stay, which is well-supported, the Court will stay the present action  
13 as against Tricorbraun, so that it may file a petition to compel in St.  
14 Louis, Missouri. The action will be stayed pending the conclusion of  
15 such arbitration.

16 **III. MOTION FOR A TRIAL CONTINUANCE**

17 Having concluded that the action against Tricorbraun will be  
18 stayed pending arbitration, Tricorbraun's motion for a trial  
19 continuance is DENIED AS MOOT.

20 **IV. MOTION FOR SANCTIONS AGAINST PLAINTIFF'S COUNSEL**

21 Finally, Tricorbraun brings a motion for sanctions against  
22 Plaintiff's counsel, Alfred Dovbish ("Dovbish"), as a result of an ex  
23 parte communication between Dovbish and an employee of Tricorbraun.  
24 Tricorbraun asks for sanctions in the amount of \$5,000. This motion is  
25 petty and warrants little discussion.

26 Plaintiff asks for sanctions under California Rules of  
27 Professional Conduct 2-100. Rule 2-100 provides: "While representing a  
28 Id. at 419-20. The court finds this reasoning highly persuasive.

1 client, a member shall not communicate directly or indirectly about the  
2 subject of the representation with a party the member knows to be  
3 represented by another lawyer in the matter, unless the member has the  
4 consent of the other lawyer." A "party" includes officers or directors  
5 of a corporation represented by counsel. Id.

6 The relevant facts are as follows: On February 18, 2010, at  
7 approximately 5:30 p.m., Andrew Bottene, a Vice President at  
8 Tricorbraun, received a call on his cell phone from an unidentified  
9 caller. When he answered, the caller identified himself as Alfred  
10 Dovbish. According to Bottene, Dovbish said that Jeff Wycoff had told  
11 him to call Bottene because Bottene was "an encyclopedia of knowledge."  
12 Dovbish asked Bottene if he was aware of the lawsuit. Bottene told  
13 Dovbish that he could not speak with him and that Dovbish should  
14 contact Tricorbraun's corporate offices. Dovbish agreed, and ended the  
15 call. The call lasted only seconds, and no substantive information  
16 about the lawsuit was discussed.

17 Plaintiff had disclosed in its Rule 26 disclosures that Bottene  
18 was a Vice President of Tricorbraun. Dovbish did not contact  
19 Tricorbraun's counsel or ask for counsel's permission prior to  
20 contacting Bottene.

21 Dovbish admits that he called Bottene, but declares that he  
22 believed Bottene no longer worked at Tricorbraun. Dovbish notes that  
23 the call lasted only seconds and that when Bottene informed him that he  
24 was still an employee of Tricorbraun, Dovbish immediately apologized  
25 and got off the phone. Dovbish's secretary (who is also his wife)  
26 overheard Dovbish's end of the conversation and confirms this account  
27 of the events.  
28



Plaintiff's motion for sanctions under Rule 2-100 is DENIED. First, it is not clear that Bottene was even a "party" at the time the communication took place, on February 18, 2010. Genlabs had dismissed its third-party complaint against Tricorbraun on February 16, 2010, and the Court had not yet granted Plaintiff's motion to amend the Complaint to name Tricorbraun. Thus, technically, Tricorbraun was not a party to the lawsuit on February 18, 2010. Regardless, however, the phone call appears to be the result of Dovbish's good faith mistake about Bottene's employment status - had Bottene no longer been employed by Tricorbraun, Dovbish could have spoken with him. Finally, by both party's accounts, no substantive information about the lawsuit was discussed during the call, and the call lasted only sanctions.

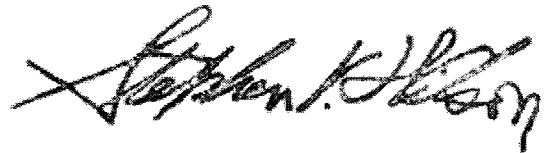
**V. CONCLUSION**

For the reasons stated above, the Court DENIES Defendant Tricorbraun's Motion to Compel Arbitration. The Court GRANTS Tricorbraun's Motion for a Stay of this Action Pending Arbitration. The action as against Tricorbraun will be stayed pending the completion of an arbitration in St. Louis, Missouri, in accordance with the parties' Agreement. Tricorbraun's Motion for a Trial Continuance is DENIED AS MOOT.

Tricorbraun's Motion for Sanctions is DENIED.

IT IS SO ORDERED.

DATED: 05/06/10



STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE